SUPREME COURT OF THE UNITED STATES.

No. 349.—October Term, 1927.

The Kansas City Southern Railway Company, Petitioner, *vs.* Franklin Jones, administrator of the Estate of D. R. Ferguson.	On Writ of Certiorari to the Supreme Court of the State of Texas.

[March 19, 1928.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action under the Employers Liability Act for the death of one R. D. Ferguson who was a car inspector on the petitioner's road. No one saw the death but the body was found between the main track and a parallel track, and the probability is that Ferguson was killed by a train going north on the former. A freight train was being made up on the parallel track, and the hypothesis of the respondent, supported by little if anything except the place where the body and the lantern of the deceased were found, is that Ferguson was engaged in inspecting the cars, and so absorbed in his work that he did not hear the approaching train but was relying upon the ringing of the engine bell, which usually was rung but which the respondent's witnesses say was not rung on this occasion. The Court below sustained the verdict on this ground. Ferguson was seen not later than a quarter before seven in the evening, so far as time can be fixed. The train passed at five minutes after seven, the time at which it was known by him to be due. His body was found at twenty-five minutes after seven. He was an experienced man. The indications are that there was nothing for him to inspect at the probable time of his death. At best it is a mere guess that he was so engaged, still more that he was absorbed in such work. The main track was straight and the train was making a great noise and showing a bright light as it

approached. Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner rather than to that of the man himself. It is unnecessary to consider whether if the case for the plaintiff were stronger the principle of *Chesapeake & Ohio Ry. Co.* v. *Nixon*, 271 U. S. 218, would apply.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.